

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD ANDREW SWANSON,

Defendant-Appellant.

UNPUBLISHED

December 23, 2003

No. 241281

Oakland Circuit Court

LC No. 01-181382-FH

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of resisting a lawful arrest causing injury, MCL 750.479a, and resisting and obstructing a police officer, MCL 750.479. He was sentenced to concurrent one-year jail terms. He appeals as of right and we affirm.

I

At 1:45 p.m. on August 30, 1999, Officer Combs was patrolling, in uniform, in a marked patrol vehicle, when he observed three vehicles make an illegal left turn on a red light. He turned on his emergency lights and followed the third vehicle into the parking lot of a muffler shop. Defendant was the driver of the vehicle. Defendant and Combs both exited their vehicles and headed for each other. Combs had turned off his emergency lights when he parked. Combs asked defendant for his driver's license, but defendant answered, "Noooo," shook his head and started walking backwards. Concerned that defendant might flee, Combs stepped between defendant and his truck, removed the keys and placed them in his pocket. Defendant accused Combs of pulling him over for driving a Japanese vehicle and threatened to call the Japanese Consulate. Combs radioed for back-up due to defendant's odd behavior.

Combs again asked for defendant's license, and defendant again refused. Defendant had backed up near the road and Combs was afraid defendant might step into traffic. He asked a third time for defendant's license and, this time, defendant gave it to him. Combs took it, and because he did not feel it would be safe to abandon eye contact with defendant in order to inspect the license, Combs placed it in his pocket, and asked defendant to get in the back seat of the patrol car. When defendant refused, Combs asked again and took his arm. Defendant broke free from Combs' grip and attempted to gouge Combs' eyes around his sunglasses with his fingernails. Combs told defendant that he was under arrest for this attack, but defendant continued his attempts to gouge Combs' eyes.

Combs then focused on getting away from defendant. He stepped back and tried to knock defendant's hands out of his face. Defendant attempted to pin Combs up against the police car, so Combs turned and started moving towards the road. Defendant put his right hand around Combs throat to choke him while using his left hand to claw at him. The two backed up into the road and crashed into the side of Orval Marlowe's van, which was in the left-hand turn lane. They hit so hard that they left scratches and dents on the side. Marlowe yelled at them to stop. Combs punched defendant in the face to force defendant to release his grip on Combs' throat. Marlowe testified that he witnessed Combs trying to control defendant, who was trying to get away, but that he did not see Combs punch defendant. He also saw that Combs had been attacked, as he had cuts and blood on his face.

John Muehler, the owner of the muffler shop, came out to render assistance. He put defendant into a full nelson to allow Combs to handcuff him. After Combs cuffed one of defendant's wrists, he led him to the ground, placed his knee on his back and attempted to cuff the other wrist. Defendant resisted, and Combs told him to comply or he would get hurt. Combs kept defendant on the ground until back-up arrived several minutes later. Combs received scratches on his face and arms from the attack, but did not require stitches and did not suffer any broken bones. Combs sought medical attention for his wounds, and underwent x-rays. Following trial,¹ defendant was convicted of resisting a lawful arrest causing injury, MCL 750.479a, and resisting and obstructing a police officer, MCL 750.479.

II

Defendant contends that his convictions under both statutes violated his right against double jeopardy under the United States and Michigan Constitutions.² We disagree.

We review questions of constitutional law de novo. *People v Hill*, 257 Mich App 126, 149-150; 667 NW2d 78 (2003). The relevant portions of MCL 750.479a in effect at the time of defendant's arrest and trial provided³:

¹ The district court refused to bind defendant over on charges of resisting a lawful arrest causing injury, MCL 750.479a(6), and resisting and obstructing a police officer engaged in lawful acts, MCL 750.479, on the ground that Combs arrested defendant when he asked him to sit in the patrol car and this was an unlawful arrest for a civil infraction. The prosecutor appealed to the circuit court, which affirmed the district court's refusal to bind defendant over on resisting arrest causing injury, MCL 750.479a. The prosecutor was granted leave to file an interlocutory appeal with this Court, which reversed the circuit court in regard to resisting a lawful arrest causing injury, MCL 750.479a. This Court found that the district court had abused its discretion in failing to bind defendant over on this charge, as the arrest was legal. *People v Swanson*, unpublished opinion per curiam of Court of Appeals, issued 9/21/01 (Docket No. 233730), slip op, p 3.

² In a footnote in the prior appeal, this Court stated:

We express no opinion regarding the propriety of both charges pending against defendant or any double jeopardy violation. Although there was one transaction of events with one victim, the parties have not raised or addressed this issue on appeal.

(6) An individual who forcibly assaults or commits a bodily injury requiring medical care or attention upon a peace or police officer of this state while the peace or police officer is engaged in making a lawful arrest, knowing him or her to be a peace or police officer, is guilty of a misdemeanor punishable by a fine of not more than \$1,000.00 or imprisonment for not more than 2 years, or both.

* * *

(9) Except as otherwise provided, a conviction under this section does not prohibit a conviction and sentence under any other applicable provision for conduct arising out of the same transaction. . . .

At the time of defendant's arrest and trial, MCL 750.479 provided⁴:

Any person who shall knowingly and willfully obstruct, resist or oppose any . . . officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the [government] or who shall assault, beat or wound any . . . officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or attempted to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than 1,000 dollars.

The Double Jeopardy clauses protect against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997); *People v Rodriguez*, 251 Mich App 10, 16-17; 650 NW2d 96 (2002). The power to define crimes and punishments belongs to the Legislature. *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995). In single-prosecution, multiple punishment cases, the only interest of the defendant is in not having more punishment imposed than that intended by the Legislature. *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). Thus, to determine if a defendant's right against double jeopardy has been violated by being punished under two separate statutes, we must determine if the Legislature intended to authorize cumulative punishment under both statutes. *People v Kulpinski*, 243 Mich App 8, 12-13; 620 NW2d 537 (2000). Initially, we must identify the harm the Legislature intended to prevent by the statutes. *People v Harding*, 443 Mich 693, 709; 506 NW2d 482 (1993); *Robideau*, *supra* at 487. When statutes prohibit the violation of the same social norm, there can be a violation of double

(...continued)

³ Effective July 15, 2002, subsection (6) was deleted, and subsection (9) was redesignated as subsection (8).

⁴ MCL 750.479 was subsequently amended, effective July 15, 2002.

jeopardy, even where they have separate elements, if the conduct in question under the statutes is so similar that the Legislature could not have intended multiple punishments. *Robideau, supra* at 487. Another consideration in determining legislative intent is the amount of punishment authorized by the statute. *Id.* When two statutes create a hierarchy of offenses, it becomes more clear that the Legislature did not intend cumulative punishments. This hierarchy exists when one statute lays out a lesser offense, which is completely subsumed by the second statute that involves aggravating factors and increased punishment. *Id.*, 487-488; *People v Price*, 214 Mich App 538, 544; 543 NW2d 49 (1995), overruled in part on other grounds *Kulpinski, supra* at 22.

In the instant case, a full analysis under the principles just set forth is unnecessary because we conclude that defendant committed two separate offenses from a temporal standpoint. The elements of resisting and obstructing a police officer, MCL 750.479, are: 1) the conduct alleged, whether active or passive, was an actual or threatened physical interference; 2) the interference was of any official specified in the statute; 3) the official was conducting his described duties; and 4) the alleged conduct was done knowingly and willfully. *People v Vasquez*, 465 Mich 83, 112, 115; 631 NW2d 711 (2001); *People v Vasquez*, 240 Mich App 239, 244; 612 NW2d 162 (2000), overruled in part on other grounds *Vasquez, supra*, 465 Mich 83. The elements of resisting a lawful arrest causing injury, MCL 750.479a, are: 1) defendant forcibly caused bodily injury to a police officer; 2) resulting in injury requiring medical care; 3) the police officer was engaged in making a lawful arrest at the time of the injury; 4) defendant intended to cause bodily harm; and 5) defendant knew the person to be a police officer. *State Farm Fire & Casualty Co v Moss*, 182 Mich App 559, 562; 452 NW2d 816 (1989).

Defendant committed the first offense when he physically refused Combs' direction to get into the back seat of the patrol car and broke free from Combs' grip on his arm. At that point, no arrest was involved, only Combs' performance of his duties in conducting the traffic stop, and defendant's refusal to cooperate had escalated to a physical interference as required under *Vasquez, supra*. Had the interaction ended there by Combs regaining control, the offense would have been complete.

Defendant went on to commit a second offense, however. After defendant broke free, he attempted to gouge Combs' eyes with his fingernails. Combs informed him that he was under arrest, and defendant continued his attack. Combs attempted to break free, but defendant continued to claw at his eyes, face and neck, and then grabbed him by the throat with one hand, gouging at his eyes with the other. They crashed against the door of a van and defendant continued to hold Combs around the neck, until Combs got him to let go by hitting him in the face, and the muffler shop owner interceded. Thus, after committing the resisting and obstructing offense, defendant went on to commit the second offense by causing bodily injury requiring medical care to Combs, while resisting arrest.

While the purpose of both statutes appears to be to protect officers from suffering physical harm in the performance of their duties, and there may well be circumstances where a double jeopardy analysis would lead to the conclusion that the Legislature did not intend multiple punishment under a particular set of facts, in the instant case, we conclude that defendant committed two distinct temporal offenses, and we discern no legislative intent – as would be evidenced by a cumulative sentencing scheme – to preclude punishment for each offense.

Affirmed.

/s/ William D. Schuette

/s/ Mark J. Cavanagh

/s/ Helene N. White